STATE'S MOTION TO ADMIT HEARSAY STATEMENTS OF VICTIM

When rape victim was upset and angry during her interviews with police and medical personnel, her statements should be admissible under the "excited utterance" exception to the hearsay rule.

The State of Arizona, by and through undersigned counsel, moves to admit the victim's excited utterances to police and medical personnel under the "excited utterance" exception to the hearsay rule. The following Memorandum supports this request.

MEMORANDUM OF POINTS AND AUTHORITIES

Rule 803, Ariz. R. Evid., gives several categories of statements that are not excluded by the hearsay rule, whether or not the declarant is available as a witness. One of these is an "excited utterance," defined as "A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." For a statement to be admissible as an excited utterance, three requirements must be satisfied:

> (1) there must have been a startling event;
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> (2) the statement must have been made soon after the event so that the declarant did not have time to fabricate; and
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> (3) the statement must relate to the startling event.

State v. Whitney, 159 Ariz. 476, 768 P.2d 638 (1989)*; State v. Ritchey*, 107 Ariz. 552, 555, 490 P.2d 558, 561 (1971); *State v. Johnson,* 183 Ariz. 623, 634, 905 P.2d 1002, 1013 (App. 1995). The exception relies on the assumption that "the excitement of certain startling events stills the reflective faculties," making it likely that an excited utterance is a "'natural' response to the actual sensations and perceptions produced by the preceding external shock," which thereby increases the chance that the statement will be truthful and reliable. *State v. Rivera*, 139 Ariz. 409, 411, 678 P.2d 1373, 1375 (1984).

There is no particular time limit for an excited utterance following a startling event. Rather, the issue is whether the declarant is still suffering from the shock of the event. In *State v. Anaya,* 165 Ariz. 535, 799 P.2d 876 (App. 1990), Anaya brandished a rifle at his wife and children, fired three shots, threatened his wife, and struck her with a rifle butt. His wife managed to escape from the home at about midnight, leaving their two preteen children in the house, and called the police. The police surrounded the home while she told them what Anaya had done and expressed fear for the safety of her husband and children. During a nightlong standoff, Anaya remained in the home, threatening the police. He released one child but kept the younger one with him. At about 4:30 a.m. an officer interviewed the wife, who told them what had precipitated her midnight call to police. Eventually, Anaya surrendered. He was charged with aggravated assault and endangerment.

At trial, Anaya's wife denied any recall of the events, and attempts to refresh her memory from police reports were unsuccessful. Over defense objections, the State moved to admit the police report of the interviews with police into evidence as an excited utterance under Rule 803(2), Ariz. R. Evid. Anaya was convicted of aggravated assault and endangerment. On appeal, he argued that the statement should not have been admitted. The Court of Appeals found no error, stating, "The spontaneity of a statement is determined from the totality of the circumstances." *Id*. at 539, 799 P.2d at 880. The Court noted that the Arizona Supreme Court has repeatedly held that the physical and emotional condition of the declarant at the time of the statement affects spontaneity more than the mere lapse of time between the event and statement. *Id*. When the wife made her original statement to police, she was crying and hysterical. Her second statement, some four hours later, was made while Anaya was still holding their child. The officer who interviewed her said she was distraught and expressed "absolute sick worry" about the child's welfare during the

interview. The Court of Appeals reasoned that since she was still under the stress of nervous excitement from the startling event, her statement after the event could be spontaneous because there had been "no break or letdown in the continuity of the transaction."

> Testimony that a declarant still appeared nervous or distraught and that there was a reasonable basis for continuing emotional upset can be sufficient proof of spontaneity even where the interval between the startling event and the statement is long enough to permit reflective thought.

State v. Anaya, 165 Ariz. at 539-40, 799 P.2d at 880-881.

Similarly, a statement made some nine hours after a sexual assault was held to be an excited utterance in *State v. Starcevich,* 139 Ariz. 378, 678 P.2d 959 (1983). In that case, the defendant held the victim against her will in the desert for approximately 24 hours and sexually assaulted her repeatedly before he dropped her off along the highway north of Tucson. The victim walked to a telephone, called the rape crisis center, and waited in a cafe for help to arrive. The waitress testified that the victim told her she had been raped. The waitress said that the victim seemed "completely broken" and that tears were running down her face, and noted, "Her mouth was so swollen and scratched she couldn't even eat her soup." *Id*. at 388, 678 P.2d at 969. Starcevich was convicted of kidnapping and sexual assault. On appeal, he contended that the amount of time between the rape and the victim's statement gave the victim time to fabricate her story. The Court disagreed, citing *State v. Barnes,* 124 Ariz. 586, 589-90, 606 P.2d 802 (1980) and *State v. Jeffers*, 135 Ariz. 404, 419, 661 P.2d 1105, 1120, *cert. denied*, 464 U.S. 865 (1983). The Court quoted *Barnes, supra*:

> Lapse of time is only one factor to be considered. If the totality of the circumstances indicate that the statement was made in a state of shock or his demeanor and actions had been altered, it is admissible even though not made immediately after the event.

State v. Starcevich, 139 Ariz. 378 at 387-388, 678 P.2d at 968-969. The Court of Appeals noted that the waitress's testimony was sufficient evidence from which "the trial court could properly conclude [the victim] was in such a state of shock that her statement was admissible." *Id*.

An excited utterance may be made in response to police questioning. In *State v. Whitney,* 159 Ariz. 476, 768 P.2d 638 (1989), Whitney picked up two teenage girl hitchhikers in his truck. When they asked to get out, he pulled over, but then chased them in his truck, trying to run over them. He got out of the truck, caught one of the girls, and tried to pull her into the truck; when she resisted, he tried to choke her. The other girl attracted the attention of three men in another car; that car stopped and Whitney then jumped in his truck and escaped. The men pursued Whitney in their car. The three men then saw an officer on the street and ran up to him, shouting about the attack. Due to the fact that they were so excited and talking at once, the police officer had to separate them and ask specific questions. *Id*. at 483, 768 P.2d 638 at 645. By the time of trial, the three men could not be found and it appeared that they had given the police false addresses and possibly false names. Over the defense's objections, the State presented the three men's statements to police as excited utterances. Whitney was convicted of kidnapping and aggravated assault.

On appeal, Whitney argued that the statements were not admissible as excited utterances because they were made in response to police questions. However, the Court of Appeals ruled that a statement made in response to a police officer's questions is not necessarily inadmissible. *Id*. The court noted that the witnesses had initiated the conversation with the police officer, and the officer testified that the witnesses were so

excited at the time that they were all talking at once. “These statements still qualify as excited utterances even though some were in part responses to the officer's questions.” *Id*.

Whitney also argued that the witnesses’ statements should have been excluded because the fact that they gave false addresses showed that they were unreliable. *Id*. at 483, 768 P.2d at 645. The Court noted, “We have not confined the application of the excited utterance exception solely to indisputably reliable witnesses,” citing *State v. Jeffers,* 135 Ariz. 404, 419-20, 661 P.2d 1105, 1120-21, *cert. denied*, 464 U.S. 865 (1983). “Admission as a hearsay exception is not foreclosed by the fact that a witness’s reliability has been impugned.” *Id*. Attacks on the witnesses’ reliability go to the weight of the statements, not their admissibility. *Id*. In addition, the Court stated that there are other facts indicating that the statements were reliable. The witnesses were neutral; they did not know any of the parties involved; each of the witnesses relayed the same story to the police while they were still excited; and their statements corroborated the victims' statements. *Id*. at 484, 768 P.2d at 846. Therefore, the trial court did not abuse its discretion in allowing their excited utterances to be admitted into evidence.

The facts in this case are similar to those in *State v. Johnson,* 183 Ariz. 623, 905 P.2d 1002 (App. 1995), affirmed on other grounds, 186 Ariz. 329, 922 P.2d 294 (1996). In that case, the victim was violently raped around 8:30 a.m. At approximately 9:30 a.m., the victim was examined by the hospital doctor and, following the examination, was interviewed by a police detective. The doctor testified she was “upset . . . frightened and overall nervous,” *id*. at 634, 922 P.2d at 1013, while the detective testified that she was “mad, angry,” and said that she would “cry at times and [become] angry at other times.” *Id*. The Court of Appeals held that the facts supported the inference that the victim was still suffering from the emotional trauma of the rape when she was interviewed. Thus, the trial court did not abuse its discretion in admitting her statements as excited utterances. The

appellate court also noted that “incidents involving rape or other sexual offenses have long been viewed as presenting unique circumstances when the spontaneous utterance exception is sought to be applied . . . . Generally a less demanding time aspect is required.” *Id*. at 634, 905 P.2d at 1013 [ellipsis in original], quoting *State v. Rivera,* 139 Ariz. 409, 412, 678 P.2d 1373, 1376 (1984). When the analysis in *Johnson* is applied to this case, the State asserts that *Johnson* clearly supports the argument that the victim's statements to the various witnesses do qualify as excited utterances under Rule 803(2) of the Arizona Rules of Evidence.

Therefore, the State respectfully requests that this Court grant the State’s Motion to Admit the Victim’s Hearsay Statements.